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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 993

NORRISTOWN BOX COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD JUDICIAL CIRCUIT

J. B. HILLEGASS,
WM. J. MORAN, JR.,
Attorneys for Petitioner.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
Ernest E. Heim, Montgomery County Representative, Norristown, Pa.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Norristown Box Company, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit rendered on December 1, 1941 and the order of the said Court entered on December 19, 1941 denying the petition of the petitioner herein to set aside the order of the National Labor Relations Board and granting the petition of the National Labor Relations Board to enforce its order.

OPINION BELOW

The Findings of Fact, Conclusions of Law and the Order of the National Labor Relations Board, hereafter called the Board, are printed on pages 458 to 498 of the record. They have been published in the official reports of the Board, 32 N. L. R. B. No. 148 (1941). The opinion of the Circuit Court of Appeals is printed on pages 515 and 516 of the record. It has not yet been officially reported but may be read in 3 C. C. H. Labor Law Service ¶ 60, 834 (1941).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 [43 Stat. 936 (1925), 28 U. S. C. § 347 (a)], and Section 10 (e) of the National Labor Relations Act [49 Stat. 453 (1935), 29 U. S. C. A. § 160 (e) (Supp. 1941)] and under General Rule 38 of this Court, Section 5, Subdivision b.

The statute involved in this case is the National Labor Relations Act, hereafter referred to as the Act (49 Stat. 449-457 (1935), 29 U.S.C.A. §151-§166 (Supp. 1941)). The pertinent provisions of the Act are Section 1, Section 7, Section 8, subdivisions 1, 2, 3, 4, and 5, Section 9 and Section 10(b) and (f). These sections of the Statute are fully set forth in an Appendix hereto.

QUESTIONS PRESENTED

1. Do suggestions, expressions of opinion and unknown conversations by an employer, unaccompanied by any threat or further action, constitute interference, restraint or coercion of employees within the meaning of section 8(1) of the act?

2. Do suggestions, expressions of opinion and unknown conversations by an employer, unaccompanied by any threats or further action, constitute domination of or interference with the formation or administration of any labor organization in violation of section 8(2) of the act?

3. Where each of two organizations, having as members approximately one-half of all the employees within the appropriate unit, claim the right to be the exclusive bargaining agency, may the board properly find an employer who refuses to bargain exclusively with either until the proper bargaining agency is determined by the board, guilty of a violation of section 8(5) of the act?

4. Where unfair labor practices are not shown by the evidence to have influenced any employee in the choice of a bargaining agency, may the board properly find one of two organizations to be company dominated?

5. Where two organizations within a company each demand the right to be the exclusive bargaining agency and the evidence is not clear as to which organization is the choice of the employees, should an election be ordered to determine the proper agency?

6. Where evidence is admitted showing that an employee has joined two organizations is it error to refuse evidence to show that the reason for changing from one

organization to the other was not the result of employer domination?

7. Where an employee is reinstated and fails to return to work within a reasonable time in violation of the reinstatement agreement and is then discharged for that reason, can such discharge be said to be discriminatory?

8. Where an unreasonable and arbitrary determination has been made that certain words and acts of an employer constitute unfair labor practices, have the rights guaranteed by the first and fifth amendments to the constitution for the United States been abridged?

STATEMENT OF FACTS

Petitioner is a small business corporation located at Norristown, Pennsylvania, and conducts a business of manufacturing, selling and distributing paper boxes.

No labor controversies or disputes were had in petitioner's plant from the time of its incorporation in 1902 until the present dispute, controversy and strike which occurred in the latter part of 1940.

During the summer of 1940, two of petitioner's employees, Ark Tressler and Frank Friend, discussed with each other the desirability of forming an unaffiliated labor organization to represent all of the employees in matters of collective bargaining with petitioner.

About the latter part of August, 1940, Charles Morris, an employee of petitioner, approached representatives of the American Federation of Labor with regard to the possibility of organizing the employees and securing majority membership.

On September 24, 1940, petitioner was informed through an anonymous source that the employees were being organized. Petitioner then called two employees, both of whom subsequently became members of the group affiliated with the American Federation of Labor, to its office, who confirmed the fact. Mr. Ray, Secretary-Treasurer of the petitioner, stated to these employees that petitioner had always gotten along well with its employees and that he was opposed to organization of any trade. Mr. Ray did nothing further in the way of preventing organization of the employees.

Almost spontaneously and simultaneously, employees of the petitioner organized in two groups, one affiliated with

the American Federation of Labor, hereafter named the Brotherhood, the other unaffiliated and named the Norristown Box Company Employees' Association, hereafter named the Association.

On or about October 6, 1940, there appeared among the employees certain pamphlets entitled "Facts About the Wagner Act." The pamphlet set forth certain rights guaranteed to the employees under the Act. The information was in question and answer form, the answers being statements made by the sponsor of the Act, reports from the committee introducing the bill in Congress, and a correct presentation of rights as interpreted by your Honorable Court. Petitioner did nothing to prevent the circulation of this pamphlet among its employees.

On October 17, 1940, the association, through its attorney, notified petitioner in writing that it claimed to represent a majority of petitioner's employees and demanded the right to be the exclusive bargaining agency for all the employees.

On October 21, 1940, the Brotherhood, at the request of petitioner's counsel, made a similar demand.

On October 22, 1940, petitioner notified the Association and the Brotherhood of the respective claims, stating that it would recognize as the exclusive bargaining agency and be willing to bargain with the group which would bring to it a proper certification from the Board.

On October 23, 1940, petitioner notified the Board of the respective claims and demands of the Brotherhood and the Association and requested that an election be had to determine the proper bargaining agency. Request had also been made by the Association to the Board to hold an election under Section 9 of the Act. These requests were refused.

On October 25, 1940, the Brotherhood, having refused to participate in a consent election, called a strike of its

members in which a minority of petitioner's employees participated.

On Saturday, October 27th and Sunday, the 28th, 1940, meetings were held in Philadelphia at which representatives of petitioner, Brotherhood, and Federal and State labor conciliators met and were unsuccessful in an effort to settle the strike. At the latter of these meetings the Brotherhood proposed the negotiation of an agreement with petitioner covering its members only. This the petitioner could not consent to.

On October 29, 1940, the Board notified petitioner that charges and amended charges had been filed by members of the Brotherhood alleging, *inter alia*, that the Association was company dominated and stated that the charge must be dissolved before steps could be taken to determine a majority.

On November 8, 1940, petitioner posted notice that help would have to be taken on because of the rush in business and in said notice welcomed the return of any strikers. By November 26th, sixteen (16) of the strikers had returned to work.

It was agreed between counsel for the Brotherhood and the petitioner that the remaining strikers might apply for reinstatement on December 17, 1940 and return to work the following Monday, December 23, 1940. All applied on that date and were reinstated. All returned to work on December 23, 1940, except Charles Morris.

On December 17th, the date he was reinstated, Charles Morris complained of ill health. He was told to report for work the following Monday and if he was not able to do so to give petitioner one day's notice. Morris did not return to work until January 9, 1941, approximately three weeks later, at which time there was no work for him and he was not given employment. He was told that there was no work for him and further that he had breached the reinstatement

agreement not only by not reporting to work as he had agreed to do but by not reporting for work within a reasonable time thereafter. For these reasons he was discharged.

On January 30, 1941, hearings were begun on the unfair labor practice charges. These continued on January 31st, February 14th and 15th, 1941.

On March 26, 1941, the trial examiner rendered an Intermediate Report in which he found in substance that petitioner had been guilty of unfair labor practices, that the Brotherhood represented the majority of employees, and recommended that an order issue directing petitioner to cease and desist from these unfair labor practices, to disestablish the Association as a bargaining representative of any of its employees, to bargain with the Brotherhood, and to reinstate Charles Morris with back pay.

Exceptions to the report were filed by petitioner and on May 8, 1941, oral argument was heard by the Board.

On June 19, 1941, the Board handed down its Decision and Order, substantially affirming the report of the trial examiner.

Petitioner, on June 30, 1941, thereupon filed a petition to the court below pursuant to Section 10(f) of the Act for a review of the Decision and Order of the Board, and the Board filed an answer and a cross-petition requesting that the petition be dismissed and its Order be enforced.

Argument was had on these petitions and on December 1, 1941, the Court handed down its decision, denying petitioner's petition and granting the Board's cross-petition. The enforcement Order of the court was entered on December 19, 1941. The decision of the court below was a *per curiam* decision stating mainly that the Order of the Board was based upon findings of fact supported by adequate evidence.

The effect of this *per curiam* decision is to adopt the Decision and Order of the Board in its entirety as the decision of the court. The court in its decision did not specifically determine any of the issues presented to it by petitioner. The court by its *per curiam* affirmance of the Board's Decision and Order, has held that the mere utterances of a supervisory employee that he is opposed to employee organization of any kind constitutes an unfair labor practice; that permitting the circulation of a pamphlet which presents true statements by sponsors of the Act and true interpretations of the Act by your Honorable Court constitute an unfair labor practice; that hearsay evidence and mere conjecture are sufficient to support a finding of unfair labor practice; that it is not necessary, in order to determine that an organization is company-dominated, to show threats of any kind or that any employee was actually coerced or intimidated; that it is not necessary to show that the unaffiliated organization could not function in an independent manner; that where no evidence is presented to the management to support a claim of a majority membership by either of two organizations, each of which claims that majority, for said management to refuse to recognize immediately the organization later determined by the Board to represent that majority, is an unfair labor practice; that it is proper for a trial examiner to admit evidence showing that an employee has changed union affiliation and at the same time refuse evidence which would show why the change was made; that an employee may refrain from returning to work for an unreasonable time in violation of his reinstatement agreement and cannot be discharged for that reason; and, that an unreasonable and arbitrary determination by the Board that certain words and acts of an employer constitute unfair labor practices does not abridge the rights guaranteed by the First and Fifth Amendments to the Constitution for the United States.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals has erred:

1. In holding that the mere utterances of supervisory employees unaccompanied by any threats either apparent or implied do constitute an unfair labor practice.

2. In holding that the circulation of a pamphlet presenting a true statement and interpretation of parts of the Act is an unfair labor practice.

3. In holding that hearsay evidence and mere conjecture and suspicion are sufficient to support a finding of unfair labor practice.

4. In holding that where no evidence has been presented by either organization with regard to its claim of a majority membership it is an unfair labor practice for an employer to refuse to recognize immediately the one later determined by the Board to represent that majority.

5. In holding that it is not improper and not prejudicial for a trial examiner to admit evidence showing that an employee has changed union affiliations and at the same time refuse to admit evidence offered to show why that change was made.

6. In holding that it is an unfair labor practice for an employer to discharge an employee for the reason that he has refrained from returning to work for an unreasonable length of time in violation of his reinstatement agreement.

7. In holding that an arbitrary and unreasonable determination by the Board that certain words and

acts of an employer constitute unfair labor practices, does not abridge the rights guaranteed by the First and Fifth Amendments to the Constitution for the United States.

REASONS FOR GRANTING THE WRIT

Petitioner presents the following reasons why your Honorable Court should issue a writ of certiorari to the Circuit Court of Appeals for the Third Judicial Circuit:

1. The decision of the court below in holding that suggestions and opinions of an employer were sufficient evidence of company domination, although the evidence clearly shows that there was no influence or coercion effected, is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Humble Oil Co. v. N.L.R.B.*, 113 F. (2d) 85 (C.C.A. 5th, 1940) and the decision of the Circuit Court of Appeals for the Fourth Circuit in *N.L.R.B. v. A. S. Abell Co.*, 97 F. (2d) 951 (C.C.A. 4th, 1938).

2. The decision of the Court below holding that permitting the circulation of a pamphlet which correctly answered certain questions with regard to the Act was a violation of Section 8(1) (2) of the Act, is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *N.L.R.B. v. Auburn Foundry*, 119 F. (2d) 331 (C.C.A. 7th, 1941).

3. The decision of the court below in holding evidence that certain Brotherhood employees believed they were being watched more closely for infractions of the rules of the company than were members of the Association was sufficient evidence of an unfair labor practice in violation of Section 8(2) of the Act, is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit in *Ballston-Stillwater K. Co. v. N.L.R.B.*, 98 F. (2d) 758 (C.C.A. 2nd, 1938).

4. The decision of the Court below upholding the Board's finding of a discriminatory discharge based upon

mere inference, there being no evidence to impeach the direct evidence to the contrary by the person who ordered the discharge, is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *N.L.R.B. v. Tex-O-Kan Flour Mills Corp.*, 122 F. (2d) 433 (C.C.A. 5th, 1941) and the decision of the Circuit Court of Appeals for the Tenth Circuit in *Nevada Consolidated Copper Corp. v. N.L.R.B.*, 122 F. (2d) 587 (C.C.A. 10th, 1941).

5. The decision of the court below that unfair labor practices have been committed by (1) an employer's refusal to recognize immediately the organization later found by the Board to be the proper bargaining agency, where two organizations each presented a claim of majority membership and demand for immediate recognition, but neither offered to prove their representative status; and (2) by the employer's request to the Board to certify the proper representative, is in conflict with the Decision of the Circuit Court of Appeals for the Eighth Circuit in *Texarkana Bus Co. v. N.L.R.B.*, 119 F. (2d) 480 (C.C.A. 8th 1941).

6. The decision of the court below in holding that the Order of the Board did not violate the substantive due process guaranteed by the Fifth Amendment to the Constitution for the United States is in conflict with the rule of law in *Jones & Laughlin Steel Corp. v. N.L.R.B.*, 301 U.S. 1, 57 Sup. Ct. 615 (1937).

7. The decision of the court below violates the First Amendment to the Constitution for the United States in that it imposes an arbitrary restriction upon the right of free speech and penalizes petitioner for uttering lawful expressions of opinion.

8. The decision of the court below is contrary to the expressed purpose and intent of the Act, and is a result not contemplated by the Congress which enacted it.

9. Determination of the questions of law presented to your Honorable Court is of great national importance and necessary to a proper and just administration of the Act.

10. The questions presented have not been heretofore judicially determined by your Honorable Court.

Wherefore, your Petitioner, referring to the annexed Brief in support of the foregoing reasons for review, respectfully prays that your Honorable Court issue a writ of certiorari directing the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Honorable Court a full and complete transcript of the record herein to the end that the said cause may be reviewed and determined by your Honorable Court as provided by law, that the judgment and order of the Circuit Court of Appeals may be reversed, and, that your petitioner may have such further relief as to your Honorable Court may seem just.